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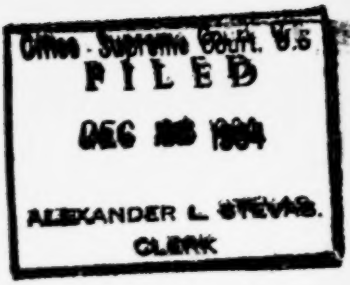

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

****

HAZEL MAE JOLLEY, PETITIONER

vs.

STATE OF NORTH CAROLINA, RESPONDENT

****

PETITION FOR A WRIT OF CERTIORARI TO
THE NORTH CAROLINA SUPREME COURT
AND REQUEST FOR SUMMARY REVERSAL.

Walter H. Dalton
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QUESTION PRESENTED

1. Did the North Carolina Supreme Court err and decide a question dealing with the requirements of the Fourth Amendment of the United States Constitution in a manner inconsistent with the applicable decisions of this Court by upholding the validity of a warrantless search of the Petitioner's home?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

****

HAZEL MAE JOLLEY, PETITIONER

vs.

STATE OF NORTH CAROLINA, RESPONDENT

****

NOW COMES the Petitioner, Hazel Mae Jolley, by and through her counsel of record, and petitions for a writ of certiorari to review the judgment of the North Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court in this case, which reverses the North Carolina Court of Appeals decision, is not yet reported but appears in (Appendix A, infra, pp. A-1 to A-18).

The opinion of the North Carolina Court of Appeals, which reversed the Petitioner's conviction and remanded the case for a new trial, is reported at 68 N.C. App. 33, 314 SE 2d 134 (Appendix B, infra pp. B-1 to B-20).

The opinion of the North Carolina Superior Court denying the Petitioner's motion to suppress was not reported, but is set forth in Appendix C, infra, pp. C-1 to C-6.

JURISDICTION

The judgment of the North Carolina Supreme Court (App. A, infra, pp. A-1 to A-19) was entered on November 6, 1984 and pursuant to Rule 31(g) of the North Carolina Rules of Appellate Procedure no right or privilege for rehearing is provided before the North Carolina Supreme Court in criminal cases. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,..."

STATEMENT OF THE CASE

On December 28, 1982 John Preston Jolley, Sr. died as a result of excessive bleeding caused by multiple gunshot wounds. On that day Deputy Mike Summers of the Rutherford County Sheriff's Department was dispatched to the home of Mr. Jolley in Ellenboro, North Carolina, and upon arrival found Mr. Jolley lying at the base of the couch in the den. He also found Mrs. Hazel Jolley, the widow and petitioner herein,

crouched behind the kitchen bar crying and visibly upset. EMT personnel had already arrived upon the scene and were attending to Mr. Jolley. Deputy Summers, while in the home, noticed a rifle similar to that marked as State's Exhibit One on a chair in the den. However, Deputy Summers did not examine the gun and made no positive identification of State's Exhibit One at trial.

Shortly after arriving at the Jolley home, Deputy Summers escorted the petitioner to his patrol car and advised her of her constitutional rights under the Miranda Decision. Thereafter, he roped off and secured the area with a crime scene poster. According to Officer Summers, some fifteen to twenty minutes later Detective David Philbeck of the Rutherford County

Sheriff's Department arrived at the Jolley home. Deputy Summers advised Detective Philbeck "he didn't know if he had a homicide or an accidental shooting." Deputy Summers then took the petitioner to the Rutherford County Jail.

While the petitioner was at the Rutherford County Jail being interrogated Detective Philbeck, without the authority of a search warrant and without a member of the Jolley family present, commenced a search of the home. The record shows he was at the home for six hours and during such time confiscated certain items from the home including a JC Higgins semi-automatic 22 caliber rifle and several spent shell casings. The petitioner filed a written motion before trial to suppress these items, but they were admitted into evidence over the objection of the

petitioner and the gun was introduced as State's Exhibit One.

Based upon the evidence presented by the State, which included State's Exhibit One, the JC Higgins 22 semi-automatic rifle, and test results pertaining to said rifle, a jury returned a verdict of guilty to second degree murder and the petitioner was given a ten year active sentence. Thereafter, an appeal was taken to the North Carolina Court of Appeals which determined, pursuant to Mincey v. Arizona, 437 U.S. 385 (1978), that State's Exhibit One was seized as a result of an unlawful search and seizure and the conviction of the petitioner was overturned and the case was remanded for a new trial. The State of North Carolina then took an appeal from the decision of the North Carolina Court of

Appeals and the North Carolina Supreme Court, in an opinion filed November 6, 1984, reversed the decision of the North Carolina Court of Appeals and remanded the case for enforcement of the sentence. The North Carolina Rules of Appellate Procedure specifically provide in Rule 31 (g) that the North Carolina Supreme Court will not entertain petitions for rehearing in criminal actions. Therefore, this petition for a writ of certiorai was filed.

REASONS FOR GRANTING THE WRIT

A writ of certiorari in the case at bar should issue because the decision of the North Carolina Supreme Court is in direct contravention of the Fourth Amendment of the United States Constitution and in direct contravention of the

decisions of the United States Supreme Court in the cases of Thompson v. Louisiana _____ U.S. _____(1984) 53 U.S.L.W. 3396 (November 26, 1984) (No. 83-6775), Mincey v. Arizona, 437 U.S. 385 (1978), United States v. Chadwick, 433 U.S. 1 (1977), and Vale v. Louisiana, 399 U.S. 30 (1970).

One of the cornerstones of our American heritage, and a foundation of our freedom, is the mandate that the people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Historically, it has been the appellate bench which has most often been called upon to echo the wisdom of our forefathers and to curb the overzealous actions of law enforcement

officers by enforcing the warrant clause of the Fourth Amendment. Such is the plea at hand.

Certainly, the most instructive case on point is that of Thompson v. Louisiana, supra, which is identical to the facts of the instant case and which was decided twenty days after the North Carolina Supreme Court filed its opinion in this case. In Thompson, deputies arrived at the home of the defendant pursuant to a call for help made by the defendant's daughter. The deputies entered the home and made a cursory search of the premises and found the defendant's husband dead as a result of gunshot wounds and the defendant unconscious due to an apparent drug overdose. The defendant's daughter

informed the officers that her mother had shot her husband and then attempted suicide. The deputies then transported the defendant to the hospital and secured the scene (emphasis added). Thirty-five minutes later homicide detectives arrived, entered the home, and conducted a two hour search of the house during which time certain items were seized. Relying upon the precedent of Mincey v. Arizona, supra, the United States Supreme Court in a per curiam decision held the evidence seized pursuant to this search was seized in violation of the Fourth Amendment and should have been suppressed at trial. This decision thereby reversed the decision of the Supreme Court of Louisiana which had held the evidence admissible.

In deciding Thompson, the United States Supreme Court reiterated that no "murder scene exception" to the warrant clause existed. The court acknowledged that the police may make warrantless entries on the premises where "they reasonably believe that a person within is in need of immediate aid," but the court indicated such right does not extend further once it has been determined that the need for such aid has abated. The court further acknowledged that the call for help did not constitute an invitation to the police or general public of such magnitude as to open the defendant's home to the search of officers after the defendant's removal.

Measuring the case at bar against the Thompson case, it becomes apparent that the search and seizure in this instance also

violates the Fourth Amendment warrant clause and the principles espoused in Mincey as was held by the North Carolina Court of Appeals. It is apparent from the Thompson decision that the call for help is insufficient to constitute consent to a search of the house when the defendant is not present. Similarly, it makes no difference in this instance that the challenged search occurred only shortly after the body of the decedent had been removed. Although it is true that the first officer on the scene had the right to enter the premises to render immediate aid, the evidence reflects that this officer thereafter "secured the scene" by roping the area. By doing so, he removed any exigency which may have existed concerning the destruction of evidence. It is

submitted that upon this "securing of the scene", the constitutional line was drawn and any entry and attendant seizure by the officers after that time without the benefit of warrant was in violation of the petitioner's right to be secure in her home against unreasonable searches and seizures. Further, the illegality of the entry is accentuated by the fact that the first officer on the scene, Officer Summers, stated to Detective Philbeck upon his arrival that he didn't know "if he had an accidental shooting, a homicide or what." It is evident that, at this point in time, no probable cause existed, at least in the mind of Officer Summers, to believe a crime had been committed. Finding no consent or exigent circumstance to justify the search of the home or the seizure of the rifle,

introduced as State's Exhibit One, the North Carolina Court of Appeals, relying upon Mincey, reversed the petitioner's conviction and remanded the case for a new trial.

The North Carolina Supreme Court in reversing the decision of the North Carolina Court of Appeals indicated the focus of that court upon the "exigent circumstance" and "consent" exceptions to the warrant clause was misplaced. Instead, it indicated the critical question was the point in time the rifle was seized, which is defined as the point when the scene was secured. Unfortunately, that court did not proceed to delineate the differences between a legal seizure versus a legal search. Instead, it held that all property within the "secured crime scene" which was in plain view and which the officer had

probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the Fourth Amendment. Thus, in essence, the court held that a lawful seizure of the area clothed any search of the home and a seizure of any items therein with the same legality. Further, the court failed to recognize that the plain view doctrine does not apply unless the item comes into plain view as a result of the lawful conduct of the officer (emphasis added). Harris v. United States, 390 U.S. 234 (1967). There was no identification by Officer Summers at trial of State's Exhibit One and further, it is clear that an actual search for, and seizure of, the items in the home by Detective Philbeck occurred after the scene was secure and any exigency had been removed. In addition,

the United States Supreme Court has clearly indicated the reasonableness of the seizure does not necessarily dictate the reasonableness of the search. See Segura v. United States, _____ U.S. _____, 104 S. Ct. 3380 (1984). In Segura, the Supreme Court of the United States noted that seizure affects only a possessory interest while a search impinges upon a privacy interest, and it is submitted that it is this privacy interest which merits heightened protection.

The Supreme Court of the United States addressed a situation instructive on this point in United States v. Chadwick, 433 U.S. 1,(1977). In Chadwick federal officers confiscated a footlocker as the defendant disembarked from a train. An hour and a half after the arrest of the

defendant a search of the footlocker was conducted without benefit of warrant and large amounts of marajuana were found. The trial court allowed the defendant's motion to suppress on the ground that the search was in violation of the warrant clause of the Fourth Amendment. The Fifth Circuit affirmed the suppression and the United States Supreme Court, speaking through Chief Justice Burger, also affirmed. In supporting this decision, Justice Burger noted that the footlocker was in the exclusive control of the federal agents and the defendant was securely in custody. Therefore, the search could not be viewed as incidental to the arrest or as justified by any other exigency. United States v. Chadwick, supra at 2485-2486. The right to invade the possessory interest in the

footlocker was not challenged, but the right to invade the privacy interest in the footlocker by way of search was challenged in this instance and such search was held improper without the benefit of warrant. The same rationale applies to the case now before the court.

It has long been held that the sanctity of the home should not be invaded by government agents absent exigent circumstances and it is the government's burden to prove the existence of such circumstances to overcome the presumption of impropriety that attaches to all warrantless home searches. Welsh v. Wisconsin, _____ U.S. _____, 94 S. Ct. 2091 (1984). More importantly, it has been recognized that the home is sacred in

Fourth Amendment terms primarily because of the privacy interests as opposed to possessory interests. Segura v. United States, supra.

Using these principles to chart the course of constitutionality, it is apparent Officer Summers had a right to enter the home pursuant to a call for help. The evidence reveals he saw a rifle on a chair but he did not confiscate the gun and made no positive identification at trial. Thereafter, Officer Summers removed the petitioner and placed her in his patrol car and advised her of her Miranda rights. At this time the decedent was also being removed from the home and Officer Summers then secured the scene. Based upon the standard espoused by the North Carolina Supreme Court and based upon Officer

Summers' own admission that he didn't know if he had an accidental shooting or an intentional homicide, it is questionable whether such "seizure" of the premises was lawful. This is so because the high court of North Carolina held that such seizure would be proper only when there was probable cause in the officer's mind (emphasis added) to associate the same with criminal acitivity. It is clear from Summers' statements that the probabilities of accident or murder lay equally balanced in his mind. Obviously, if the test of probable cause fails in this instance, the search fails and the petitioner's motion to suppress should have been allowed even upon the North Carolina Supreme Court's own standard.

However, assuming only for the sake of argument that the securing of the scene was a proper invasion of the petitioner's possessory interests, it is clear that the six hour search of the petitioner's home by Detective Philbeck and his confiscation of the rifle which was later introduced as State's Exhibit One was an improper invasion of the petitioner's privacy interests. Once the petitioner was transported to the Rutherford County Jail and once the premises were secured, there was no threat of any evidence being destroyed in the home or taken away. Therefore, there was no exigency or consent to justify entry into the home by any officer. More than sufficient time was provided for the review by a magistrate of the facts and circumstances to determine

whether the issuance of a warrant was merited. To bypass this constitutional safeguard is to tread upon the rights of the petitioner and to enter upon ground forbidden by the exclusionary rule. It is this protected area which is the haven of all citizens and which protects the citizenry from overzealous law enforcement and the threat of a police state. With conviction in hand the police would argue their action was wise and appropriate. However, there is no question the evidence in the form of the rifle was tainted as well as the test results taken therefrom. There is also no question that our forefathers drafted the Fourth Amendment for the wisdom of all and all cases must be judged by this greater view.

In conclusion, it is submitted that the North Carolina Court of Appeals' reliance upon Mincey v. Arizona, supra, in reversing the petitioner's conviction on the ground that the rifle in question should have been suppressed from evidence as the petitioner requested was well founded. Certainly, Mincey was the polar star which guided the United States Supreme Court in Thompson on identical facts. Additionally, it is submitted that the Supreme Court of North Carolina failed to distinguish between the varying standards for reasonable searches versus reasonable seizures. Its failure to carry its analysis to this extent and its failure to apply the principle of Mincey underscores the error in its ruling. Therefore, based upon Thompson, Mincey, Chadwick, and

Segura, it is respectively requested that a writ of certiorari be granted.

CONCLUSION

For the reasons stated and due to the similarity of the Thompson case and the ruling of the United States Supreme Court therein, this Court should grant a writ of certiorari to review the judgment and opinion of the North Carolina Supreme Court. Indeed, so clear is the error of the North Carolina Supreme Court, it is submitted that the appropriate relief would be summary reversal of the decision.

Respectfully submitted, this the 27th day of December, 1984.

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FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 27th day of December, 1984, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA
Filed November 6, 1984

STATE OF NORTH CAROLINA, No. 237A84-

vs. Rutherford

HAZEL MAE JOLLEY)

On appeal of right by the State of North Carolina from the decision of the Court of Appeals, 68 N.C. App. 33, 314 S.E.2d 134 (1984), reversing judgment entered by Brown, J., at the 25 May 1983 session of Superior Court, Rutherford County. Heard in the Supreme Court 8 September 1984.

Evidence for the state tended to show that on 28 December 1982 Defendant shot and killed her husband, John Preston Jolley, at the Jolley residece on Oak Grove Road in Ellenboro. Mr. Jolley was shot with a .22 semi-automatic rifle. Immediately after shooting her husband, defendant dialed a telephone operator and asked that help be sent to the Jolley residence.

Members of a volunteer rescue squad and deputies from the Rutherford County Sheriff's Department responded to defendant's call for help. The rescue personnel arrived first and began performing emergency cardiopulmonary resuscitation procedures on Mr. Jolley. Deputy Summers of the Sheriff's Department was the first law enforcement officer to arrive. He arrived about 3:00 P.M. and saw the rescue technicians working on the victim, who was lying on the floor in front of a couch in the den-kitchen area of the house.1 Deputy Summers observed a .22 semi-automatic rifle leaning against a chair about six feet from the victim. He also observed defendant kneeling on the floor of the kitchen, sobbing. Officer Summers decided to escort defendant out of the house because he felt that it would help her emotionally to be away from her

husband's body. He took her outside and placed her in the front seat of his patrol car. He then returned to the house as rescue personnel were carrying the victim out to an ambulance. Deputy Summers testified that after the victim and the emergency personnel left, "I secured a rope and crime scene poster out of the trunk of my patrol car and roped off the residence the best I could. Officer Bill Watts came at that time and about that time Major Philbeck arrived. I had been there ten or fifteen minutes when Major Philbeck arrived." Major Philbeck went into the house as Summers and Watts were advising defendant of her Miranda rights. Summers then went into the house and conferred briefly with Philbeck, after which Summers drove defendant to the Rutherford County Jail.

Major Philbeck testified that when he entered the house he saw a .22 caliber rifle lying in a chair next to a wall. He also found some spent cartridges and shells in the house. Philbeck stayed at the Jolley residence for six hours, after which he took the .22 caliber rifle and the cartridges and shells to the Rutherford County Jail. These items were introduced into evidence during defendant's trial.

Defendant's evidence tended to show that on the 28 December 1982 her husband was resting on the sofa in their den when defendant decided to go shopping. Defendant intended to buy some bullets and took a rifle out of its gun rack in the den to see what kind of bullets it required. Defendant testified:

> "I got it down and came in front of the T.V. and started toward the kitchen where the light was on where I could see to take one of the bullets out of

> the thing. The next thing I remember is that he was lying on the floor hurt. I threw the gun behind me and went to him. I don't remember the gun going off.

After the gun went off defendant dialed the telephone operator for help.

Defendant also introduced evidence to the effect that multiple discharges are common in the kind of gun used to shoot the victim.

Defendant was convicted of murder in the second degree and was sentenced to ten years in prison. Defendant appealed the judgment to the Court of Appeals, which reversed and remanded for a new trial. Because there was a dissenting opinion in the Court of Appeals, defendant was entitled to an appeal of right to this Court pursuant to N.C.G.S. 7A-30(2).

> RUFUS L. EDMISTEN, Attorney General, by ROY A. GILES, JR., Assistant Attorney General, for the state.

WALTER H. DALTON for defendant.

MARTIN, Justice.

The sole issue in this appeal is whether the Court of Appeals erred in holding that the rifle transported to the Rutherford County Jail by Major Philbeck was improperly admitted into evidence at trial. We hold that the Court of Appeals did so err, and thus we reverse.

As the opinion of the Court of Appeals notes, on 20 April 1983 defendant filed a motion to suppress the .22 caliber rifle and any test results from the gun. The basis of this motion was stated as follows:

> Its exclusion is required by the Constitution of the United States or the Constitution of North Carolina in that it resulted from an unreasonable search and seizue and in addition, it was obtained as a result of a substantial violation of the provisions of Chapter 15A of the General Statutes in that the sworn testimony of the officers

involved at the probable cause hearing clearly show that the defendant was arrested at her home on December 28, 1982 and was taken to the Rutherford County Jail; thereafter, other officers proceeded to her residence without the authority of a search warrant and under no recognized exception to the requirement of a search warrant and entered the defendant's premises without the consent of the defendant and without her being present and in violation of law and thereafter, seized the .22 rifle, J. C. Higgins model, which the defendant now seeks to suppress, together with any test results relating to said rifle; that said intrusion into the defendant's home without the authority of a search warrant was unlawful and a substantial violation of her rights and in violation of the Fourth Amendment of the United States Constitution and in violation of Chapter 15A of the North Carolina General Statutes.

After a hearing the trial court made the following findings of fact:

That on December 28, 1982 at 3:00 P.M., Deputy Michael Summers of the Rutherford County Sheriff's Department went to the home of John Preston Jolley and Hazel Mae Jolley to investigate a possible shooting; that he found John Jolley in the den on the floor and EMT personnel were working on him.

That he saw a .22 rifle in a chair in the den area.

That the Defendant, Hazel Mae Jolley, was in the kitchen area in a squatting position

That Summers asked her to sit in the patrol car, that he thought getting her out of the house would help her emotional state, that he thereafter helped rope the area off to secure the scene, that he spoke with the defendant in his patrol car, and advised her of her rights, on a form used by the Rutherford County Sheriff's Department.

. . . .

That Detective David Philbeck had arrived at the Jolley residence about five minutes after 3:00, and Summers turned control of the premises over to him.

That Philbeck went inside the residence where he made photographs, seized the rifle, spent cartridges, a lead fragment, made a diagram, and visually observed the premises.

The trial court then denied defendant's motion to suppress the gun and test results.

The Court of Appeals held that Philbeck had conducted a warrantless search not justified under either the consent to search or exigent circumstances exceptions to the warrant requirement of the fourth amendment to the United States Constitution. See, e.g., Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290 (1978). Therefore the Court of Appeals concluded that his removal of the gun was an illegal seizure and the gun and test results from it should not have been permitted into evidence.2

While the Court of Appeals' discussion of the two exceptions to the warrant requirement is interesting, it is irrelevent to the present set of facts. The Court of Appeals erred in failing to focus upon the key issue in this case: at what point was the rifle in question seized within the meaning of the fourth amendment?

We hold that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant. As the Supreme Court of the United States observed in Mincey vs. Arizona, 437 U.S. 385, 392-93, 57 L. Ed. 2d 290, 300:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar

> police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid... ..And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

(Citations and footnotes omitted.) Accord Texas vs. Brown, 460 U.S. 730, 739, 75 L. Ed. 2d 502, 512 (1983) ("[I]f, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."). The present case is also similar to State vs. Robbins, 275 N.C. 537, 545, 169 S.E.2d 858, 863 (1969), in which this Court stated:

> In the instant case the officer was not engaged in a search for evidence to be used in a criminal prosecution. He entered defendant's dwelling at the request of defendant's brothers, who were very apprehensive and worried about defendant. Under the present

> law the officer would not have had any basis to request a search warrant since he could not allege a particular object which he sought. State vs. Bullard, 267 N.C. 599, 148 S.E. 2d 565. He was simply lending the strong arm of the law to a distressed family who feared that harm had come to their brother and sister-in-law. The officer's presence was lawful and his testimony as to things in plain view was properly admitted into evidence.

See also Illinois vs. Andreas, ___U.S.___, ____, 77 L. Ed. 2d 1003, 1010 (1983) ("[O]nce police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost..."). Cf. United States vs. Jacobsen, ___U.S.__, ____, 80 L. Ed. 2d 85, 98 (1984)("The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment."); Katz vs. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582 (1967) ("What a person knowingly exposes to the public, even in his own home...is not a subject

of the Fourth Amendment protection."). See Coolidge vs. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564 (1971) (plurality opinion).

This holding is in accord with the following post-Mincey cases: People vs. Harding, 620 P.2d 545 (1980)(blood-stained wallpaper and blood-stained housecoat properly seized as evidence "in plain view"); Wooton vs. State, 398 So. 2d 963 (Fla. App. 1981) (stressing seizure was of "items of evidence which were in plain view" and that there "was no inspection of drawers or closets"); Grant vs. State, 374 So. 2d 630 (Fla. App. 1979) (weapons in plain view near body); State vs. Johnson, 413 A. 2d 931, 934 (Me. 1980), appeal after remand, 434 A. 2d 532 (Me. 1981) (police who initially entered secured the premises and then waited outside until medical

examiner and lab technician arrived and then all entered; held, this a permissable reentry; "the polic conducted a very limited search, seizing only items that were in plain view"); State vs. Anderson, 42 Or. App. 29, 599 P. 2d 1225 (1979), cert. denied, 446 U.S. 920 (1980) (proper to maintain control of scene three hours and then record scene with videotape camera where "officers photographed only what was in plain view"); State vs. Eacret, 40 Or. App. 341, 345, 595 P.2d 490, 493 (1979) ("officers were entitled to photograph and seize evidence in plain view"); State vs. Martin, 274 N.W. 2d 893 (S.D.), cert. denied, 444 U.S. 883 (1979).

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States vs.

Jacobsen, ___U.S.___, ___, 80 L. Ed. 2d 85, 94 (1984) (footnote omitted). When an officer secures a crime scene he has limited the ability of persons other than law enforcement officers to remove items from within the secured area. State vs. Brown, 306 N.C. 151, 293 S.E. 2d 569 (1982) (crime scene that had been cordoned off and secured by police was within the possession and control of the state); N.C. Gen. Stat. § 15A-903(d) (1983). Such items have thus been "seized." See Hale vs. Henkel, 201 U.S. 43, 76, 50 L. Ed. 652, 666 (1906). Seizure of evidence in plain view by the securing of a crime scene is also analogous to seizure of a person: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry vs. Ohio, 392 U.S. 1, 16, 20 L. Ed. 2d 7 889, 903 (1968).

See also Michigan vs. Summers, 452 U.S. 692, 69 L. Ed. 2d 340 (1981).

It is clear that in the instant case Deputy Summers lawfully entered the Jolley residence reasonably believing that a person inside was in need of immediate aid. Defendant herself called the telephone operator to ask specifically that help be sent quickly. When Summers first entered the Jolley house, the rifle at issue was in plain view, six feet from where the victim was felled. Deputy Summers had probable cause to associate the rifle with criminal activity. Texas vs. Brown, 460 U.S. 730, 75 L. Ed. 2d 502.3 He thereupon secured the residence by roping it off and posting signs. He thereby lawfully seized the rifle. Because the rifle was lawfully seized, it was properly admitted into

evidence. Philbeck, as a law enforcement officer who also arrived at the scene as a result of defendant's call for help, had every right to enter the area secured by Deputy Summers. Once lawfully inside this area he then properly transported to the county jail the rifle which was in plain view and which had been seized by the securing of the crime scene. It follows that the test results were likewise admissible.

We need not decide whether the additional items identified by Major Philbeck were competent as evidence, as defendant is not contesting their admission into evidence. The evidence at issue in this case was not obtained by a search, but was seized by being in plain view within the crime scene when it was secured by Deputy Summers. See Mincey vs. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290.

The decision of the Court of Appeals is REVERSED.

FOOTNOTES

1. The den and kitchen comprised one large room partially separated by a bar.

2. The record reveals that defendant did not object to Officer Summers' testimony about the gun. Thus she has waived all objections concerning the gun and its test results. N.C. Gen. Stat. §1446(b) (1983). Nevertheless, in our discretion we have decided to review the matter.

3. It was not necessary that the officer knew the rifle was evidence of a crime in order to comply with the "immediately apparent" requirement of Coolidge vs. New Hampshjire, 403 U.W. 443, 29 L. Ed. 2d 564 (1971). It is sufficient if the facts available to the officer would warrant a man of reasonable caution in the belief that the rifle may be useful as evidence of a crime. Texas vs. Brown, 460 U.S. 730, 75 L. Ed. 2d 502 (1983).

APPENDIX B

NO. 8329SC895

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 1984

STATE OF NORTH CAROLINA

v. Rutherford County

HAZEL MAE JOLLEY No. 82CRS7932

Appeal by defendant from Brown, Judge. Judgment entered 26 May 1983 in Rutherford County Superior Court. Heard in the Court of Appeals 15 February 1984.

Evidence offered at trial tended to show the following pertinent facts. On 28 December 1982 John Jolley, Sr., died as a result of multiple gunshot wounds. Rutherford County Deputy Sheriff Mike Summers, responding to a call for help, found Jolley lying on the floor in his home being attended by emergency medical

technicians. He also found defendant, Jolley's widow, crouched beside the kitchen bar crying. He observed a gun similar to that later introduced as state's exhibit number one in the den. He did not examine or seize the gun or make a positive identification of it at trial.

Shortly after arriving, Deputy Summers placed defendant in his patrol car and advised her of her Miranda rights. Jolley's body was removed from the house and Deputy Summers "roped off" the crime scene. Shortly thereafter Detective Philbeck arrived and Summers informed him that he was unsure whether the shooting was a homicide or accidental. Mrs. Jolley was taken to jail. No other member of the defendant's family was present at the house.

Without seeking consent and without obtaining a search warrant, Detective Philbeck conducted a six hour search of the home. During this search he confiscated a semi-automatic .22 caliber rifle and several spent shell cases. The items were introduced at trial over defendant's objection.

At the Rutherford County jail, defendant gave a statement indicating that the shooting was accidental. Later that evening Detective Simmons disassembled the seized rifle. The rifle was then reassembled and tested by firing one bullet. Based upon his examination and testing of the rifle Detective Simmons was allowed to give his opinion at trial that the weapon was functioning properly. An S.B.I. agent who

later examined the weapon was allowed to testify that, based upon his examination of the weapon, it was functioning properly.

Defendant, testifying in her own defense, presented evidence which tended to show the following facts and events. On 28 December 1982, her husband was resting on the sofa in their house, and defendant was going out shopping and decided to buy some new bullets for the gun. The gun was loaded because some time prior to this her daughter's estranged husband had come to the house and tried to cause trouble. On that occasion the daughter pointed the gun at her husband, but he took it away from her and threw it to the ground, damaging it. Defendant's son repaired the gun, and told defendant that the bullets needed to be replaced. While defendant was carrying the gun to the kitchen to determine what

type of bullets were needed, the gun discharged, striking her husband. Defendant also offered testimony from expert witnesses who stated that multiple discharges were common with these type weapons and that they should be tested in a controlled environment before they were disassembled and then reassembled.

Defendant was convicted of second degree murder and from a judgment sentencing her to imprisonment for a term of ten years she appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Hamrick, Bowen, Nanney & Dalton, by Walter H. Dalton, for defendant.

WELLS, Judge.

In her second assignment of error defendant contends the court erred in denying her motion to suppress the state's exhibit number one, a J. C. Higgins .22 semi-automatic rifle, on the grounds that the gun was obtained as a result of an illegal search and seizure. We agree and grant defendant a new trial.

On 20 April 1983, defendant filed a motion to suppress alleging, inter alia:

> The grounds for the suppression of this evidence are as follows:
>
> (a) Its exclusion is required by the Constitution of the United States or the Constitution of North Carolina in that it resulted from an unreasonable search and seizure and in addition, it was obtained as a result of a substantial violation of the provisions of Chapter 15A of the General Statutes in that the sworn

> testimony of the officers involved at the probable cause hearing clearly show that the defendant was arrested at her home on December 28, 1982 and was taken to the Rutherford County Jail; thereafter, other officers proceeded to her residence without the authority of a search warrant and under no recognized exception to the requirement of a search warrant and entered the defendant's premises without the consent of the defendant and without her being present and in violation of law and thereafter, seized the .22 rifle, J. C. Higgins model, which the defendant now seeks to suppress, together with any test results relating to said rifle; that said intrusion into the defendant's home without the authority of a search warrant was unlawful and a substantial violation of her rights and in violation of the Fourth Amendment of the United States Constitution and in violation of Chapter 15A of the North Carolina General Statutes.

Following a hearing on the motion the trial court made the following pertinent findings of fact and conclusions of law:

> That on December 28, 1982 at 3:00 p.m., Deputy Michael Summers

of the Rutherford County Sheriff's Department went to the home of John Preston Jolley and Hazel Mae Jolley to investigate a possible shooting; that he found John Jolley in the den on the floor and EMT personnel were working on him.

That he saw a .22 rifle in a chair in the den area.

That the Defendant, Hazel Mae Jolley, was in the kitchen area in a squatting position.

That Summers asked her to sit in the patrol car, that he thought getting her out of the house would help her emotional state, that he thereafter helped rope the area off to secure the scene, that he spoke with the defendant in his patrol (car) and advised her of her rights, on a form used by the Rutherford County Sheriff's Department.

That Detective David Philbeck had arrived at the Jolley residence about five minutes after 3:00, and Summers turned control of the premises over to him.

That Philbeck went inside the residence where he made a diagram, and visually observed the premises.

...

From the foregoing findings of fact the Court concludes:

1. That a search warrant was not required for Detective

> Philbeck to enter the Jolley home and conduct an investigation of the shooting of John Preston Jolley; and that the evidence seized is competent and should be admitted into evidence.
>
> ...

Based upon these findings and conclusions the motion to suppress was denied.

Searches conducted without properly issued search warrants are per se unreasonable under the Fourth Amendment, unless they fall within certain specific exceptions. Among these exceptions are exigent circumstances and consent to search. Coolidge v. New Hampshire, 403, 91 S. Ct. 2022, 29 L. Ed. 2d 564, reh. denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d (1971). The trial court did not find that either of these exceptions existed, but denied the motion to suppress

because he concluded that "a search warrant was not required for Detective Philbeck to enter the Jolley home and conduct an investigation of the shooting." The state first contends that the trial court was correct based upon the theory that the search was conducted under exigent circumstances. Secondly, the state contends that Detective Philbeck had consent to search the house. We cannot agree with either of these contentions.

The exigent circumstances argument must be rejected in light of the United States Supreme Court decision in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). In Mincey a gun battle erupted during the undercover drug buy at defendant's department. Once this happened officers stormed the apartment and rendered aid to the wounded.

Within ten minutes of the shooting, detectives not involved in the undercover transaction arrived at the apartment and began a four day search of the premises. Among the items seized during the search were illegal drugs. Defendant was convicted of assault, homicide and narcotics offenses. The Arizona Supreme Court, in upholding the narcotics convictions, held that the warrantless search of defendant's apartment was permissible since it was part of a routine homicide investigation. On appeal, the United States Supreme Court reversed defendant's conviction holding that the warrantless search violated defendant's constitutional rights. In its decision the Court said:

> We do not question the right of the police to respond to emergency situations....(t)he Fourth Amendment

> does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.....But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation....'

(Citations omitted). Id.

In the case at bar, when Detective Philbeck arrived at the scene, defendant and the victim had been removed, and the scene, as Philbeck found it presented no exigent circumstances. Under the rule of Mincey vs. Arizona, supra, the legality of Detective Philbeck's search could not be based on exigent circumstances.

The state also contends that Detective Philbeck was in the house with the consent of the defendant. "It is well settled that

a person may waive his right to be free from unreasonable searches and seizure. A consent to search will constitute such a waiver, only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search." State vs. McPeak, 243 N.C. 243, 90 S.E. 2d 5-1 (1955). When the state relies upon consent as a basis for a warrantless search, the police have no more authority than that they have been given by the consent. 2 W. LaFave, Search and Seizure, § 8.1 (1978). The trial court did not find that there was a consent to search. When a trial court makes no findings of fact relating to an issue and there is no conflict in the voir dire testimony "the necessary findings are implied" from the court's admission of the evidence. State vs. Biggs, 289 N.C. 522,

223 S.E. 2d 371 (1976). Under the rule of Biggs we imply that the trial court found that consent was given in light of the denial of defendant's motion to suppress. The court's findings of fact are conclusive on appeal only if they are supported by competent evidence. State vs. Biggs, supra.

In the case at bar the only consent given was consent, in the form of a phone call, to come into the house to aid the victim. We do not believe that this invitation can properly be used to show consent to a search of the premises by an officer who was not involved in aiding the victim. There was nothing in defendant's conversations with Deputy Summers to indicate that defendant consented to a search by Detective Philbeck, and defendant never spoke to Detective Philbeck at all.

We are unable to agree that there was any evidence to support a finding that defendant consented to Philbeck's search.

Having found no exigent circumstances or consent which would justify a warrantless search, we hold that the trial court erred in denying defendant's motion to suppress. We therefore reverse defendant's conviction and remand the cause for a new trial.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge BRASWELL dissents.

NO. 8329SC895

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 1984

STATE OF NORTH CAROLINA

v. Rutherford County

HAZEL MAE JOLLEY No. 82CRS7932

BRASWELL, Judge, dissenting:

I respectfully dissent and would vote no error. The majority opinion defines the scope of the defendant's consent too narrowly and it unreasonably restricts the ability of law enforcement officers to investigate probable crimes when called to the scene. Eight shots were fired from the rifle. Seven wounds of entry were counted in the body of the husband.

The defendant testified that after the rifle was fired:

> The next thing I remember is that he was lying on the floor hurt. I threw the gun behind me and went to him. I don't remember the gun going off. He was laying face down on the floor and said "Get help." I went to the telephone and dialed the operator to get help.

In response to a general call for help, the EMS personnel, Deputy Summers and Detective Philbeck were notified and sent to the

Jolley home. By making this phone call, the defendant gave her consent for entry into the home to those who usually respond to such calls for help. The record shows that Deputy Summers arrived at 3:00 p.m. and found the EMS personnel performing CPR on Mr. Jolley. Detective Philbeck arrived at 3:05 p.m. The defendant in her brief does not object to Deputy Summers' entry into her home, further indicating that her consent was not limited only to emergency medical technicians. Both officers saw the rifle in question in plain view. Detective Philbeck actually seized the rifle, along with eight .22 caliber shell casings from various spots about the den. I believe that the Constitution does not require such a technical tightrope walking of the rules of search and seizure. The constitutionality of a seizure should not depend on which

officer arrived and entered the house first. The law enforcement officers' legal authority to be in the house should not be lost, like losing one's place in line, because the first officer to arrive had left the house to escort the defendnat outside and because the officer who arrived five minutes later [but pursuant to the original call for help] failed to beat the body out of the house to justify exigent circumstances.

The majority opinion states that "[i]n the case at bar the only consent given was consent, in the form of a phone call, to come into the house to aid the victim. We do not believe that this invitation can properly be used to show consent to a search of the premises by an officer [Detective Philbeck] who was not involved in aiding the victim." The defendant did not limit her

consent in such a fashion and the officers called to her home were under no duty to ask how long consent would last. Detective Philbeck, like Deputy Summers, entered the premises to conduct a general investigation into a possible homicide. This entry was made possible without a warrant by the defendant's consent. Also, contrary to the majority opinion, Philbeck searched only the kitchen-den area which made up one large open room in the Jolley home. He did not search the entire premises. The defendant's consent and the limited search are in themselves sufficient to distinguish this case from Mincey vs. Arizona, supra.

I would hold that the trial court's findings of fact are supported by competent evidence and that the defendant's motion to suppress was properly denied.

In the alternative, applying the law of State vs. Johnson, ___N.C.____, ____, S.E. 2d ____ (filed 3 April 1984), I would vote to remand for a new voir dire hearing on both the subject of consent and exigent circumstances. As in Johnson, it could be said here that there is a lack of sufficient findings of fact and conclusions of law in this case, as well as the lack of evidence in the transcript, for our review of the legality of the entry of law enforcement officers into the dwelling house pursuant to a general call for help. It could be that on this record that both the majority and myself are engaging in speculation.

I dissent.

APPENDIX C
ORDER OF THE TRIAL COURT ON MOTION TO SUPPRESS

THE COURT: This matter was heard on motion to suppress evidence seized at the home of the Defendant, Hazel Mae Jolley, and to suppress of statements she made to investigating officers.

From the evidence presented, the Court finds the following facts:

That on December 28, 1982, at 3:00 P.M., Deputy Michael Summers of the Rutherford County Sheriff's Department went to the home of John Preston Jolley and Hazel Mae Jolley to investigate a possible shooting; that he found John Jolley in the den on the floor and EMT personnel were working on him.

That he saw a .22 rifle in a chair in the den area.

That the Defendant Hazel Mae Jolley, was in the kitchen area in a squatting position.

That Summers asked her to sit in the patrol car, that he thought getting her out of the house would help her emotional state, that he thereafter helped rope the area off to secure the scene, that he spoke with the Defendant in his patrol and advised her of her rights, on a form used by the Rutherford County Sheriff's Department.

That he told Ms. Jolley that she had the right to remain silent, not make any statement, that anything she said could and would be used against her in court;

That she had the right to talk to a lawyer for advise before being asked any questions, and have him or anyone else present with her during questioning, that if she could not afford a lawyer one would be appointed for her by the Court before questioning, if she wished; that if she

decided to answer questions without a lawyer she could stop answering at any time, and that she could stop answering questions at any time until she talked to a lawyer.

Ms. Jolley indicated that she did not want her lawyer and that she was willing to talk with the officer. That she was advised of her rights at about 3:21 P.M. on December 28, 1982. That thereafter she asked Deputy Summers about Jolley's condition, and said that the gun just kept going off. That Summers then asked Ms. Jolley to go with him to the county jail for further questioning; that Ms. Jolley went with him; that Summers did not know whether this was a homicide or accidental killing.

That Detective David Philbeck had arrived at the Jolley residence about five

minutes after 3:00, and Summers turned control of the premises over to him.

That Philbeck went inside the residence where he made photographs, seized the rifle, spent cartridges, a lead fragment, made a diagram, and visually observed the premises.

That Ms. Jolley was taken to the Rutherford County Jail, that she was again advised of her rights by Deputy Sheriff C. W. Simmons, that Mr. Simmons told Ms. Jolley at 4:05 P.M. on December 28th that she had the right to remain silent and not make any statement, that anything she said could and would be used against her in court, that she had the right to talk to a lawyer for advice before being asked any questions and have him or anyone else with her during questioning; that if she could not afford a lawyer one would be appointed for her before questioning, that if she

decided to answer questions without a lawyer she had the right to stop at any time, and that she had the right to stop answering questions at any time until she spoke to a lawyer.

That she again indicated that she did not want a lawyer and that she was willing to talk with the officers, and that she thereafter made a statement.

That after making the statement to Deputy Simmons, the Defendant was charged with the murder of her husband.

From the foregoing findings of fact the Court concludes:

1. That a search warrant was not required for Detective Philbeck to enter the Jolley home and conduct an investigation of the shooting of John Preston Jolley; and that the evidence seized is competent and should be admitted into evidence.

2. That the Defendant was fully advised of her rights, both at her residence and at the jail prior to any quetioning; she talked with the officers freely, knowingly, and intelligently, voluntarily; that she waived each of her rights, and that the statement was made in full understanding of her Constitutional rights to remain silent and the right to counsel.

3. That the Defendant was not under arrest until she made a statement at the Rutherford County Jail, even though Officer Simmons would have had probable cause to arrest the Defendant while she was still at her residence.

It is therefore ordered that the Defendant's motion to suppress is denied and his objection to the evidence is overruled.

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No. 84-1050

In The
Supreme Court of the United States
October Term, 1984

HAZEL MAE JOLLEY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were petitioner's rights as guaranteed by the Fourth Amendment to the United States Constitution violated by the warrantless seizure and removal of the murder weapon from the home of petitioner?

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No. 84-1050

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OPINIONS BELOW

This was a criminal proceeding brought by the State of North Carolina against the Petitioner arising from a bill of indictment charging Petitioner with the murder of her husband, John Preston Jolley, Sr. The case proceeded to trial upon the charge of second degree murder. From a verdict of guilty and a sentence of imprisonment for a term of ten (10) years, Petitioner appealed to the North Carolina Court of Appeals. The North Carolina

Court of Appeals reversed the conviction and remanded the case for a new trial. The majority opinion of that Court ruled that the trial judge erred in failing to suppress the murder weapon (a .22 caliber semi-automatic rifle) seized from Petitioner's home. Braswell, J., dissented. The opinion of the North Carolina Court of Appeals is reported at 68 N.C. App. 33, 314 S.E. 2d, 134 (1984). A copy of the opinion is set forth in Petitioner's Appendix B beginning at page B-1.

Pursuant to N.C.G.S. 7A-30[1], the Respondent, State of North Carolina, appealed the decision of the North Carolina Court of Appeals to the Supreme Court of North Carolina as a matter of right. The Supreme Court of North Carolina reversed the decision of the North Carolina Court of Appeals. The opinion of the North Carolina Supreme Court is reported at 312 N.C. 296, — S.E. 2d, — (1984). A copy of the opinion is set forth in Petitioner's Appendix A beginning at page A-1.

From the decision of the North Carolina Supreme Court, Petitioner has filed this Petition for Writ of Certiorari to the North Carolina Supreme Court.

———o———

[1]N.C.G.S. 7A-30(2) provides for an appeal to the North Carolina Supreme Court as a matter of right from any decision of the North Carolina Court of Appeals in which there is a dissent.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . ."

STATEMENT OF THE CASE

Evidence for the State tended to show that on 28 December 1982 Petitioner shot and killed her husband, John Preston Jolley, at the Jolley residence on Oak Grove Road in Ellenboro. Mr. Jolley was shot numerous times with a .22 semi-automatic rifle. Immediately after shooting her husband, Petitioner dialed a telephone operator and asked that help be sent to the Jolley residence.

Members of a volunteer rescue squad and deputies from the Rutherford County Sheriff's Department responded to Petitioner's call for help. The rescue personnel

arrived first and began performing emergency cardiopulmonary resuscitation procedures on Mr. Jolley. Deputy Summers of the Sheriff's Department was the first law enforcement officer to arrive. He arrived about 3:00 P.M. and saw the rescue technicians working on the victim, who was lying on the floor in front of a couch in the den-kitchen area of the house. The den-kitchen area comprised one large room partially separated by a bar. Deputy Summers observed a .22 semi-automatic rifle leaning against a chair about six feet from the victim. He also observed Petitioner kneeling on the floor of the kitchen, sobbing. Officer Summers decided to escort Petitioner out of the house because he felt that it would help her emotionally to be away from her husband's body. He took her outside and placed her in the front seat of his patrol car. He then returned to the house as rescue personnel were carrying the victim out to an ambulance. After the emergency personnel had transported the victim away from the scene, Deputy Summers secured a rope and crime scene poster from the trunk of his car and roped off the residence as best as he could. About that time, Officer Bill Watts arrived and shortly after that Major Philbeck arrived. Deputy Summers had been there about ten or fifteen minutes when Major Philbeck arrived. Major Philbeck went into the house as Summers and Watts were advising Petitioner of her Miranda rights. Summers then went into the house and conferred briefly with Philbeck, after which Summers drove Petitioner to the Rutherford County Jail.

Major Philbeck testified that when he entered the house he observed a .22 caliber rifle lying in a chair next to a wall in the den. He also found some spent cartridges and shells in the house. Philbeck stayed at the Jolley residence for six hours. He examined only the kitchen and den area of the house. He did not make a search of other rooms in the house. He took the .22 caliber rifle and the cartridges and shells to the Rutherford County Jail. These items were introduced into evidence during Petitioner's trial.

Several witnesses for the State testified that they examined State's exhibit number one, the .22 rifle taken from the den of the Jolley home, and they found it to be in proper operating order. They found nothing which would have caused the weapon to discharge in an automatic fashion.

Petitioner's evidence tended to show that on 28 December 1982 her husband was resting on the sofa in their den when she decided to go shopping. She stated she intended to buy some bullets and took a rifle out of its gun rack in the den to see what kind of bullets it required. She testified that the rifle accidently discharged while she was attempting to remove a bullet from it. She testified further that the semi-automatic rifle malfunctioned when it accidently discharged and continued to fire in an automatic fashion. She testified that after the rifle discharged, she threw it behind her in the den and dialed the telephone operator for help. Petitioner also introduced evidence to the effect that multiple discharges are common in the kind of rifle in question.

Prior to trial, Petitioner filed a written motion to suppress the "rifle" and "any test results pertaining to

the gun". The basis for the motion was that its exclusion is required by the Constitution of the United States or the Constitution of North Carolina in that the seizure of the rifle resulted from an unlawful search and seizure. The trial judge denied the motion to suppress.

———o———

REASONS WHY THE WRIT SHOULD BE DENIED

The North Carolina Supreme Court properly concluded that petitioner's rights under the Fourth Amendment were not violated by the warrantless seizure of the murder weapon from the petitioner's house.

The North Carolina Court of Appeals held that Philbeck had conducted a warrantless search not justified under either the consent to search or exigent circumstances exceptions to the warrant requirements of the Fourth Amendment. The Court concluded that the scene as Philbeck found it presented no exigent circumstances and Petitioner's call for help could not be viewed as consent to search by an officer (Philbeck) who was not involved in aiding the victim.

The North Carolina Supreme Court reversed holding that the Court of Appeals erred in failing to focus upon the key issue, to wit: At what point was the rifle in question seized within the meaning of the Fourth Amendment? The Supreme Court held that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of crime, and secures the crime scene from persons other than law enforcement officers by appropri-

ate means, all property within the crime scene *in plain view which the officer has probable cause to associate with criminal activity* is thereby lawfully seized within the meaning of the Fourth Amendment. Officers arriving at the scene thereafter can examine and remove property *in plain view* without a search warrant.

There is a "seizure" of property when there is some meaningful interference with an individual's possessory interest in that property. *United States v. Jacobsen*, — U.S. —, 80 L. Ed. 2d 85 (1984). When a law enforcement officer secures a crime scene, he limits the ability of persons other than law enforcement officers to remove items from the secured area. Thus, such items are seized within the meaning of the Fourth Amendment.

Petitioner does not question the fact that Deputy Summers lawfully entered the Jolley residence. He responded to Petitioner's call for help and entered the premises reasonably believing that a person inside was in need of immediate aid. The Petitioner, emergency personnel and the victim were still in the house. The rifle in issue was observed by Summers in plain view six feet from the victim's body.

In *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L. Ed. 2d 290 (1978) this Court stated it was not questioning the right of police officers to respond to emergency situations. The Court further stated that the police may seize any evidence which is in plain view during the course of their legitimate activities. Under the ruling in *Mincey* it is clear that Deputy Summers could have seized the rifle in issue when he first entered the house. The State submits the right to seize this evidence was not lost simply

because Deputy Summers elected to do the humane thing and escort Petitioner out of the house because she was emotionally upset.

His action in roping off and posting the area as a crime scene constituted a seizure of the rifle. When Philbeck, who also responded to Petitioner's call for help arrived, Summers turned the crime scene over to him. When Summers re-entered the premises to explain the situation to Philbeck, he could have taken possession of the rifle. Instead, he left the rifle in place and a fellow officer transported it to the County jail.

Petitioner argues there was no probable cause to seize the rifle. In support of this argument she points out that when Philbeck arrived at the house, Summers told him he did not know if they were dealing with an accidental shooting or a homicide.

The State submits Deputy Summers had probable cause to associate the rifle with criminal activity. *Texas v. Brown,* 460 U.S. 730, 75 L. Ed. 2d 502 (1982). It was not necessary for Summers to know the rifle was evidence of a crime in order to comply with the "immediately apparent" requirement of *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). It is sufficient if the facts available to the officer would warrant a man of reasonable caution in the belief that the rifle may be useful as evidence of a crime. It does not demand any showing that such a belief is correct, or more likely true than false. "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Texas v. Brown,* 460 U.S. 730, 742.

Major Philbeck's observation of the rifle in issue constitutes nothing more than a "second look" at an item in plain view already lawfully observed and seized by Deputy Summers. Once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost. *Illinois v. Andreas,* — U.S. —, 77 L. Ed. 2d 1003 (1983); *United States v. Jacobsen, supra.* See also *Katz v. United States,* 389 U.S. 347, 19 L. Ed. 2d 576 (1967); *Coolidge v. New Hampshire, supra.*

Major Philbeck also responded to Petitioner's call for help. Petitioner was still at the scene although the body had been removed and transported away. Philbeck's entry into the house was nothing more than a continuation of Summers' initial entry. *Michigan v. Tyler,* 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

When a police officer has observed an object in plain view the owner's remaining interests in the object are merely those of possession and ownership. Requiring police to obtain a warrant once they have obtained a first-hand perception of incriminating evidence generally would be a "needless inconvenience", *Texas v. Brown, supra.* It was lawful and proper for Philbeck to transport to the county jail the rifle which was in plain view and which had been lawfully seized by the securing of the crime scene by Deputy Summers.

The ruling of the North Carolina Supreme Court is in accord with the following post-*Mincey* cases in which this Court has denied certiorari: *State v. Anderson,* 42 Or. App. 29, 599 P. 2d 1225 (1979), *cert. denied,* 446 U.S. 920 (1980); *State v. Martin,* 274 N.W. 2d 893 (S.D.), *cert. denied,* 444 U.S. 883 (1979).

Petitioner relies primarily upon *Mincey* and *Thompson v. Louisana,* 53 U.S.L.W. 3396 (November 26, 1984) to support her argument that certiorari should be granted. Each of these cases is distinguishable from the case at bar.

In *Mincey* a gun battle erupted during an undercover drug buy at defendant's apartment. Undercover officers stormed the apartment to render aid to the wounded. The wounded were removed from the premises. Detectives, who were not involved in the undercover operation, arrived at the scene and began a general search of the entire premises which lasted four days. The search included the opening of drawers, closets, cupboards, the emptying of clothing, and the removal of carpets. Several hundred items of evidence were seized, including illegal drugs which were concealed in the apartment. No search warrant was obtained.

The Arizona Supreme Court upheld narcotic convictions against the defendant on the ground that the warrantless search was permissible as a part of a routine homicide investigation. This Court reversed holding there is no "murder scene exception" to the warrant requirements of the Fourth Amendment. The Court stated " . . . that the warrantless search of Mincey's apartment was not constitutionally permissible because a homicide had recently occurred there." 437 U.S. 385, 395.

In *Thompson* deputies went to the home of defendant pursuant to a homicide report from defendant's daughter. Upon their arrival at the scene, they were advised by defendant's daughter that defendant had shot her husband and then attempted suicide. The daughter let them in the house. The deputies found defendant's husband dead of

gunshot wounds in one bedroom and the defendant unconscious in another bedroom due to an apparent drug overdose. The deputies immediately transported the unconscious defendant to a hospital and secured the scene. About thirty-five minutes later two detectives from the homicide unit arrived and conducted what they described as a two hour "general exploratory search for evidence of a crime". During the search they examined each room in the house. They seized a pistol found inside a chest of drawers in the same room as deceased's body, a torn up note in a wastepaper basket in an adjoining room, and a letter (alleged to be a suicide note) found folded up inside an envelope containing a Christmas card on top of a chest of drawers.

A sharply divided Louisiana Supreme Court upheld the seizure of all the evidence. This Court, citing *Mincey*, reversed. In so doing, the Court stated:

> Petitioner's attempt to get medical assistance does not evidence a diminished exception of privacy on her part. *To be sure, this action would have justified the authorities in seizing evidence under the plain view doctrine while they were in petitioner's house to offer her assistance.* In addition, the same doctrine may justify seizure of evidence obtained in the limited 'victim-or-suspect' search discussed in Mincey. *However, the evidence at issue here was not discovered in plain view while the police were assisting petitioner to the hospital,* nor was it discovered during the 'victim-or-suspect' search that had been completed by the time the homicide investigators arrived. 53 U.S.L.W. 3396, 3397 (Emphasis added.)

In the case at bar, the rifle in issue was discovered in plain view while Deputy Summers was lawfully in Petitioner's house to render aid to the victim in response to

Petitioner's call for help. Philbeck also responded to the call for help. Petitioner was still present at the scene when he arrived, and she did not object to his entry into the house.

Petitioner argues that the rifle was inadmissible because Philbeck conducted a six hour search in the house. Although Philbeck remained in the house for six hours, it is clear from the record that the rifle was not discovered as the result of a "search" of Petitioner's premises. The rifle was in plain view. The only other items taken from the premises were spent cartridges and bullets. All of these items were discovered in the den where the shooting occurred. Philbeck's investigation was limited to the den-kitchen area of the house. He did not conduct a search of the entire house.

N.C.G.S. 15A-975 requires that a motion to suppress evidence on constitutional grounds be made prior to trial unless certain specified exceptions, not applicable to this case, apply. Petitioner's pre-trial motion to suppress was limited to the "rifle" and "test results" stemming from its examination. Even assuming for the sake of argument that some of the spent cartridges and bullets were not in plain view, Petitioner waived any right to object to the introduction of these items into evidence. Thus, both the North Carolina Court of Appeals and the North Carolina Supreme Court limited the scope of their respective decisions to the constitutionality of the seizure of the rifle from Petitioner's house. As the North Carolina Supreme Court noted, "We need not decide whether the additional items identified by Major Philbeck were competent as evidence, as defendant is not contesting their admission into evidence." 312 N.C. at 303.

Unlike *Mincey* and *Thompson* there was no general search of the entire premises. The discovery of the rifle in issue did not require a prying into hidden places for that which was concealed. It was in plain view in close proximity to the victim's body. Philbeck's observation of the rifle constituted nothing more than a "second look" at an item lawfully observed and seized by Deputy Summers. Philbeck did not discover the rifle as the result of a search: he merely transported an item already lawfully seized to the county jail.

As Judge Braswell stated in his dissenting opinion in the Court of Appeals decision: "The law enforcement officer's legal authority to be in the house should not be lost, like losing one's place in line, because the first officer to arrive had left the house to escort the defendant outside and because the officer [Philbeck] who arrived five minutes later [but pursuant to the original call for help] failed to beat the body out of the house to justify exigent circumstances." 68 N. C. App. at 39.

Petitioner stresses the fact that in *Thompson* the officers who responded to the call for help *secured the scene* before they transported the defendant to a hospital. Therefore, she argues the decision of the North Carolina Supreme Court in this case is contrary to the ruling of this Court in *Thompson*. This argument is without merit. In *Thompson* the officers who responded to the call for help did not observe any incriminating evidence in plain view while they were in the defendant's house to render aid. All of the incriminating evidence was concealed; it was revealed as the result of the warrantless search by officers who did not respond to the call for help.

The decision of the North Carolina Supreme Court is not in conflict with *Thompson*. The North Carolina Court simply holds that when an officer responds to a call for help and observes incriminating evidence in plain view while he is lawfully within the defendant's house to render aid, and he thereafter secures the crime scene, the officer's action in securing the crime scene constitutes a "seizure" by him of the evidence lawfully observed in plain view. An officer subsequently entering the crime scene can lawfully take possession of the seized evidence and transport it to the jail.

CONCLUSION

The decision of the North Carolina Supreme Court is not in conflict with the decisions of this Court in *Mincey* and *Thompson*. For the reasons stated herein it is respectfully submitted that Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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